Filed 2/26/13

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

LUCKY UNITED PROPERTIES INVESTMENTS, INC., et al., Cross-complainants and Appellants, v. ALBERT LEE, Cross-defendant and Appellant.	A132914 (City and County of San Francisco Super. Ct. No. CGC-06-454503)

BY THE COURT:**

IT IS ORDERED that the opinion filed on February 4, 2013, is modified as follows and appellant Albert Lee's petition for rehearing is DENIED:

1. Replace "$70,656.47" with "$70,675.54" on each of the following four pages:

- in part I.E., page 12, third full paragraph, first sentence;
- in part II.C.2., page 30, first paragraph, first sentence;
- in part II.C.2., page 31, first full paragraph, first sentence;
- in part II.D., page 42, the final paragraph (commencing on p. 42 and concluding on p. 43), first sentence.

2. On page 38, at the end of the first paragraph in part II.D, add a new footnote number 16 (with all following footnotes renumbered accordingly):

> [16] For example, the July 26, 2011 order apparently overlooks a $360 cost award that was included in the January 31 order. Because the parties do not argue on appeal that the omission of this amount in the July 26 order was error, we deem the issue forfeited. Lee's attempt to raise this issue (and other issues related to the treatment of the January 31 awards in the July 26 order) for the first time in his

* Pursuant to California Rules of Court, rules 8.1105(b) and 8.1110, this opinion is certified for publication with the exception of parts II.A., II.C. and II.D.

** Before Simons, Acting P.J., Needham, J., and Bruiniers, J.

petition for rehearing is untimely. (Cf. *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, 500 [refusing to entertain an argument raised for the first time in a reply brief].)

The modification effects no change in the judgment.

Dated_____ _____Acting P.J.

Superior Court of the City and County of San Francisco, No. CGC-06-454503, Paul H. Alvarado, Judge.

Law Offices of Mattaniah Eytan and Mattaniah Eytan for Cross-complainants and Appellants.

Kessler & Seecof and Benjamin R. Seecof for Cross-defendant and Appellant.

Filed 2/4/13 (unmodified version)

CERTIFIED FOR PARTIAL PUBLICATION*

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The parties before us have been embroiled in litigation in one form or another for over a decade.[1] Originally a dispute between property investors, the genesis of the present conflict was a suit in which each side alleged malicious prosecution by the opposing parties and their respective counsel in the underlying property lawsuit, and each side successfully obtaining dismissal of the other's malicious prosecution claims through a special motion to strike under the anti-SLAPP (strategic lawsuit against public

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[1] See, e.g., *Woo v. Lien* (Oct. 2, 2002, A094960) (nonpub. opn.); *Woo v. Lien* (Oct. 3, 2002, A096145) (nonpub. opn.); *Shih v. Superior Court* (June 13, 2005, A110431) (nonpub. order); *Woo v. Lien* (Sept. 15, 2006, A113350) (nonpub. order); *Lien v. Lucky United Properties Investment, Inc.* (2008) 163 Cal.App.4th 620 (appeal No. A117110); *Woo v. Lien* (June 12, 2008, A114380) (nonpub. opn.); *Lucky United Properties Investment, Inc. v. Lien* (June 16, 2008, A119134) (nonpub. order); *Shih v. Lee* (Aug. 25, 2008, A120203) (nonpub. opn.); *Lien v. Lucky United Properties Investment, Inc.* (Nov. 26, 2008, A118698/A120068) (nonpub. opn.); *Lucky United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125 (appeal No. A124965); *Shih v. Lien* (Aug. 11, 2011, A128525) (nonpub. opn.); *Shih v. Lien* (Oct. 30, 2012, A132471) (nonpub. opn.).

participation) statute. (Code Civ. Proc., § 425.16;[2] see *Lien v. Lucky United Properties Investment, Inc., supra,* 163 Cal.App.4th 620 (*Lien*).) Far from resolving the litigation through these dismissals, the parties have continued to litigate over the fees and costs which the anti-SLAPP statute provides to a prevailing party. (See *Lucky United Properties Investment, Inc. v. Lee, supra,* 185 Cal.App.4th at pp. 130–131, 136–139 (*Lucky*).)

The current battle is over the proper method of calculation of interest owed on the various fee and cost awards. More specifically, the question is the date on which interest begins to accrue on postjudgment awards of fees and costs. We addressed this issue in part in a prior appeal. (*Lucky*, *supra*, 185 Cal.App.4th at pp. 136–139.) Since we find our prior ruling in *Lucky* to be binding law of the case, we have no occasion here to revisit that holding. *Lucky* did not, however, expressly address when interest starts to accrue on awards for costs and fees *incurred* postjudgment. On remand, the trial court ruled that, under *Lucky*, *all* postjudgment awards of costs and fees that were incurred *in the trial court* (whether prejudgment or postjudgment) start to accrue interest on the date of entry of underlying judgment, but awards of costs and fees that were incurred *on appeal* constitute independent judgments and thus start to accrue interest on the dates of the awards themselves. Both sides disagree with the trial court's approach. In the published portion of our opinion, we conclude that interest on awards of fees and costs incurred postjudgment starts to accrue on the date of entry of the awards themselves. Applying this rule, in the unpublished portion of this opinion, we recalculate the principal amount of the judgment and accrued interest remaining unsatisfied as of the date of the appealed trial court order. Also in the unpublished portion of our opinion, we reject Lucky's argument that the trial judge lacked jurisdiction after a postremittitur challenge under section 170.6, and we reject the parties' other challenges to the trial court's orders.

[2] All statutory references are to the Code of Civil Procedure unless otherwise indicated.

I. BACKGROUND

The competing claims grew out of a lawsuit originally filed in 1999, involving a dispute over the purchase of real property in San Francisco.[3] (See *Lien, supra,* 163 Cal.App.4th at pp. 622–623.) The relevant factual background in the present dispute is set forth in *Lucky*'s statement of facts. "In July 2006, Eric Lien (Lien) initiated the instant case by filing a malicious prosecution complaint against Lucky United Properties Investment, Inc. (Lucky), Chin Teh Shih (also known as Jessie Woo) as trustee for the Woo Family 2000 Trust, and their attorney, Mattaniah Eytan. [¶] Lucky and Shih (referred to collectively herein as Lucky) responded to Lien's complaint by filing a special motion to strike under the anti-SLAPP statute. (§ 425.16.) The trial court granted the motion. [¶] Lucky also filed a cross-complaint for malicious prosecution against, inter alia, Lien and his attorney, [Albert] Lee. In response, Lien filed a special motion to strike the cross-complaint under the anti-SLAPP statute (§ 425.16), which the trial court granted. Lucky appealed, and we affirmed the order in [*Lien*]. [¶] Lee brought his own special motion to strike Lucky's cross-complaint, which the trial court granted as well. Lucky appealed (*Lucky United Properties Investment v. Lien*[, *supra,*] A119134) [app. dism.])." (*Lucky, supra,* 185 Cal.App.4th at p. 130.)

A. *Award of Prejudgment Costs and Fees*

In August 2007, Lee sought an award of the costs and attorney fees he incurred in connection with his successful anti-SLAPP motion. His related July cost memorandum for $415 was uncontested and granted by operation of law. In a November 6, 2007 order, the court awarded Lee $26,407.50 ($25,500 in attorney fees and $907.50 in additional costs) as the prevailing party on the anti-SLAPP motion pursuant to section 425.16, subdivision (c) (hereafter section 425.16(c)). (*Lucky, supra,* 185 Cal.App.4th at p. 131 &

[3] In the first opinion we issued in the underlying property dispute, Justice Gemello aptly observed "This case arises from the joint purchase of property on Joy Street in San Francisco by Ming Woo, Eric Lien, and Pi-Ching Yen. The purchase has yielded much grief and little joy." (*Woo v. Lien, supra,* A094960.)

fn. 2.) Lucky appealed from the November 6, 2007 order. (See *Lucky United Properties Investment v. Lee, supra,* A120203.)

B. *Pre*-Lucky *Awards of Postjudgment Costs and Fees; Tenders of Payment*

On November 13, 2007, Lee prepared and recorded an abstract of judgment and filed notices of judgment lien. The next day (November 14), he filed a cost memorandum to recover $424 in enforcement costs for these activities. Lucky did not file a motion to tax these costs, which were thus awarded by operation of law. Much later, in a February 6, 2009 order, the trial court determined that $335 of this $424 award should have been disallowed. The court granted Lucky a $335 offset against the cost and fee awards the court made in the February 6, 2009 order. (*Lucky, supra,* 185 Cal.App.4th at pp. 131–136 & fn. 6, 145–146.)

On December 31, 2007, Lucky mailed to Lee a $26,819.90 check as payment for the November 6, 2007 award plus interest. Lee accepted the payment, but asserted it was insufficient to fully satisfy the judgment because it did not include the $424 cost award. (*Lucky, supra,* 185 Cal.App.4th at p. 132.)

On June 16, 2008, we dismissed Lucky's appeal (No. A119134) from the order that granted Lee's motion to strike. Our remittitur stated that Lee was to recover costs on appeal. Lee filed a $587.20 cost memorandum claiming these costs and the trial court denied Lucky's motion to tax. (*Lucky, supra,* 185 Cal.App.4th at p. 132.) Lucky paid the $587.20 cost award in August. Lee sought additional costs and fees incurred on appeal No. A119134 pursuant to section 425.16(c). In an August 20, 2008 order, the court awarded $33,830 in response to this motion. (*Lucky,* at pp. 132–133.)

On August 21, 2008, Lucky mailed Lee a check for $33,830, which was "tendered in full and complete satisfaction of that award and may not be used for any other purpose or applied to any other account. By accepting that check, you will acknowledge full and complete satisfaction of the award." Lee disputed the sufficiency of the payment, but deposited the check. (*Lucky, supra,* 185 Cal.App.4th at p. 133.)

On August 25, 2008, we affirmed the November 6, 2007 order in appeal No. A120203. Our remittitur indicated that Lee was entitled to costs on appeal. On or

about October 28, 2008, Lee filed a $400.68 cost memorandum claiming these costs and the court denied Lucky's motion to tax. (*Lucky, supra,* 185 Cal.App.4th at pp. 133–134.) Lucky paid the $400.68 cost award in December.

On November 13, 2008, Lucky sent Lee a "Demand for Acknowledgement Of Satisfaction Of Judgment" pursuant to section 724.050, which identified the August 20, 2008 order as the "judgment." Lee rejected Lucky's demand. (*Lucky, supra,* 185 Cal.App.4th at p. 134.) On December 10, Lucky filed a motion for entry of full satisfaction of judgment under section 724.050, subdivision (d), contending there had been an accord and satisfaction under California Uniform Commercial Code section 3311 by his tender of the cashier's check for $33,830. Lucky also sought an award of attorney fees and costs incurred in connection with this motion, and imposition of a $100 statutory penalty against Lee for failing to acknowledge satisfaction of the August 20, 2008 order. (*Lucky,* at p. 135.)

On December 2, 2008, Lee filed a comprehensive cost and fee motion, which inter alia sought fees for enforcing the November 6, 2007 order, fees incurred in appeal No. A120203, fees incurred in opposing Lucky's motion to tax October 28, 2008 cost memorandum, and fees and costs in preparing the December 2 motion itself. (*Lucky, supra,* 185 Cal.App.4th at pp. 134–135, fn. omitted.)

In a February 6, 2009 order, the court granted Lucky's motion for entry of full satisfaction of judgment, imposed a $100 penalty on Lee for failing to acknowledge satisfaction of judgment, and awarded Lucky $9,510 in attorney fees and costs for prevailing on the motion (see §§ 724.050, 724.080). The court also ruled on Lee's December 2, 2008 cost and fee motion as will be further discussed *post.* Lee's appeal of the February 6, 2009 order was decided in *Lucky.* (See *Lucky, supra,* 185 Cal.App.4th at pp. 135–136.)

C. Lucky *Decision, Appeal No. 124965: Legal Framework*

Before addressing the specific issues raised in Lee's current appeal, we reiterate our discussion in *Lucky* of several governing principles concerning judgments, costs,

attorney fees, and interest—all of which played a significant role in the most recent proceedings on remand and bear directly on the instant appeal.

"1. *Judgment*

" 'A judgment is the final determination of the rights of the parties in an action or proceeding.' (§ 577.) There may be, in some circumstances, judgments for or against one or more of several plaintiffs or defendants in a single case (§ 578), but there is always one judgment that determines the rights of any one particular party or parties (Lucky) vis-à-vis another party on the other side of the pleadings (Lee).

"In the matter before us, there is no document in the record entitled 'Judgment.' However, the order granting Lee's anti-SLAPP motion to strike states: 'The Cross-Complaint For Damages For Malicious Prosecution is hereby stricken and cross-defendant Lee is hereby dismissed with prejudice. [¶] IT IS SO ORDERED ADJUDGED AND DECREED.' A written order of dismissal signed by the court constitutes a judgment and is effective for all purposes. (§ 581d; *Cohen v. Hughes Markets, Inc.* (1995) 36 Cal.App.4th 1693, 1695, fn. 1.) For purposes of this appeal, the judgment is the order dismissing Lee from the case.

"We also note that the order of dismissal does not specifically provide that Lee shall recover attorney fees and costs. This recitation is unnecessary, however, since attorney fees and costs are awarded to the prevailing party on an anti-SLAPP motion to strike as a matter of law, pursuant to section [425.16(c)]. (See also §§ 1032, 1033.5.)

"2. *Amount of the Judgment*

"The principal amount of a judgment is the amount of any damages awarded, plus any costs (including attorney fees) to which the prevailing party may be entitled, less any amounts paid by the judgment debtor. (§ 680.300.) Postjudgment interest accrues on the principal amount of the judgment at the rate of 10 percent per annum. (§ 685.010.) How the costs are added to the judgment, and how interest is calculated, turns on the manner in which those costs were imposed or the purpose for which the costs were incurred.

"*Prejudgment Costs to Prevailing Party.* As a general rule, the prevailing party may recover certain statutory costs incurred in the litigation up to and including entry of

judgment. (§§ 1032, 1033.5.) These costs may include attorney fees, if authorized by contract, statute (such as the anti-SLAPP statute) or law. (§ 1033.5, subd. (a)(10).) Most costs are obtained by filing a cost memorandum, although attorney fees require a separate noticed motion. (§ 1033.5, subd. (c); Cal. Rules of Court, rule 3.1702.)[4] Where costs are established by the judgment, but the amount of the award is ascertained at a later time, the court clerk enters the costs on the judgment after the amount is determined. ([Rule] 3.1700(b)(4); *Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 369.) In other words, the amount of the cost award is incorporated into the judgment.

"Interest at the rate of 10 percent per annum accrues on the unpaid principal amount of the judgment (§ 685.010), including the amount of the cost award and attorney fees award (§ 680.300), as of the date of judgment entry (§ 685.020, subd. (a)). Therefore, interest ordinarily begins to accrue on the prejudgment cost and attorney fees portion of the judgment as of the same time it begins to accrue on all other monetary portions of the judgment—upon entry of judgment. (See *Sternwest Corp. v. Ash* (1986) 183 Cal.App.3d 74, 76–77 [once attorney fee award is determined by the trial court, it is added to the judgment, and the total judgment bears statutory postjudgment interest until paid].)

"*Postjudgment Enforcement Costs.* In addition to attorney fees and costs imposed as a result of prevailing in the action, postjudgment costs of enforcing the judgment may also be recovered. Some costs, such as fees incurred in regard to abstracts of judgment or notice of judgment liens, may be claimed as a matter of right under section 685.070. Other enforcement expenses incurred by a judgment creditor are recoverable if, upon noticed motion, the court determines they were reasonable and necessary costs of enforcing a judgment. (§ 685.040; see *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1141 & fn. 6 (*Ketchum*) [attorney fees incurred in regard to previous award of fees under anti-SLAPP statute are recoverable under § 685.040]; *Wanland v. Law Offices of Mastagni,*

[4] All further rule references are to the California Rules of Court.

Holstedt & Chiurazzi (2006) 141 Cal.App.4th 15, 22–23 . . . [expenses of enforcing anti-SLAPP attorney fees award are recoverable under § 685.040].)

"When postjudgment enforcement costs are allowed, they become part of the principal amount of the judgment. (§§ 685.070, subd. (d), 685.090, subd. (a); *David S. Karton, A Law Corp. v. Dougherty* (2009) 171 Cal.App.4th 133, 147 . . . .) Therefore, interest accrues upon those costs at the rate of 10 percent per annum. (§ 685.010, subd. (a).)

"*Appellate Court Order of Costs on Appeal.* If an appeal is taken from the judgment, the party prevailing in the Court of Appeal is usually entitled to costs on appeal. ([Rule] 8.278.) The award of costs is included in the remittitur, although the amount of the award is determined in the trial court. ([Rule] 8.278(b)(1), (c).) These costs, however, are not added to the trial court judgment, but constitute a separate judgment. (*Los Angeles Unified School Dist. v. Wilshire Center Marketplace* (2001) 89 Cal.App.4th 1413, 1419 (*Los Angeles Unified School Dist.*); see . . . rule 8.278(b)(1), (c)(3).) Interest thereon begins to run from the date of the entry of the trial court's award. (See *Dalzell v. Kelly* (1952) 115 Cal.App.2d 60, 62–63 [costs awarded on appeal by appellate court bear interest from the date of taxing costs or expiration of time for taxing].)

"*Trial Court Order of Costs on Appeal.* A party may also obtain an award of costs, including attorney fees, if it has successfully defended on appeal the trial court's grant of its anti-SLAPP motion to strike. (*Wilkerson v. Sullivan* (2002) 99 Cal.App.4th 443, 448; *Evans v. Unkow* (1995) 38 Cal.App.4th 1490, 1499–1500.) It is not entirely clear whether such an award should be incorporated into the original judgment (since it is imposed by statute rather than by the Court of Appeal, determined in the trial court, and intended to protect the defendant who succeeded in the trial court on the motion to strike) or should constitute an independent judgment (since it pertains to costs incurred solely in the appellate court). (See *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 461 [award of attorney fees and costs under [§ 425.16(c)] does not depend on Court of Appeal making any award]; cf. *Los Angeles Unified School Dist., supra,*

89 Cal.App.4th at p. 1419 [costs on appeal awarded pursuant to § 1268.720, at the discretion of the appellate court, did not affect the finality of the underlying judgment].) Although in this case Lee obtained awards of attorney fees and costs for expenses incurred on appeal, we need not (and do not) decide this issue in order to resolve the appeal.

"3. *Allocation of Payments on Judgment*

"Payment on a judgment is allocated first to accrued interest on the principal amount, and then to the principal. (*Big Bear Properties, Inc. v. Gherman* [(1979)] 95 Cal.App.3d [908], 915 . . . ; see § 695.220.)" (*Lucky, supra,* 185 Cal.App.4th at pp. 136–139, fn. & parallel citation omitted.)

D. Lucky, *Appeal No. 124965: Specific Rulings*

In *Lucky*, we first reversed the trial court's denial of Lee's December 2, 2008 request for attorney fees incurred in enforcing the November 6, 2007 order. (*Lucky, supra,* 185 Cal.App.4th at pp. 131, 140.) The trial court had denied the enforcement fees because they were not sought before satisfaction of judgment as required by section 685.080, subdivision (a). (*Lucky*, at p. 141.) The trial court apparently relied on the fact that in December 2007, long before Lee filed his December 2, 2008 motion, Lucky paid Lee $26,819.90 toward the November 6, 2007 award of $26,407.50. (*Id.* at pp. 132, 134–135, 141; § 685.080, subd. (a).) We held that the relevant "judgment" was the June 26, 2007 dismissal of Lucky's cross-complaint against Lee as augmented by all subsequent cost and fee awards, which were incorporated into the judgment under the principles we had set forth earlier in our opinion. (*Lucky*, at pp. 142–145.) As of December 2007, when Lucky made the $26,819.90 payment, the judgment totaled $27,246.50 without accrued interest ($415 + $26,407.50 + $424). (*Lucky*, at pp. 141–142.) Lucky's December 2007 payment did not satisfy this amount. (*Id.* at p. 142.) Therefore, Lee's motion "was not barred by the time limits of section 685.080." (*Lucky*, at p. 142.) We reversed the trial court's denial of Lee's $2,100 fee request for enforcing the November 6 award. (*Id.* at p. 152.)

Second, we reversed the trial court's $335 offset of Lee's cost and fee award, which was based on a finding that $335 of the $424 in costs Lee claimed on November 14, 2007 should have been taxed. (*Lucky, supra,* 185 Cal.App.4th at pp. 145–147, 152.) We held that the cost award had become final long before December 2008, when Lucky first raised its objections to the cost award and long before February 2009, when the trial court reduced the award, and could not be reduced at that late date. (*Id.* at pp. 146–147.)

Third, we reversed the trial court's order acknowledging Lucky's satisfaction of judgment, as well as the associated imposition of a statutory penalty and award of fees and costs against Lee. (*Lucky, supra,* 185 Cal.App.4th at pp. 147–152.) Accepting for purposes of argument that Lucky's motion properly sought an order acknowledging satisfaction of the August 20, 2008 award alone (separate from the rest of the judgment), we still reversed because (a) Lucky's August 21 payment did not satisfy that award in full because it did not include accrued interest (*id.* at p. 148, fn. 13) and (b) Lee's acceptance of the payment did not effect an accord and satisfaction (*id.* at pp. 148–151). We reversed the order granting Lucky's motion for acknowledgment of satisfaction of judgment, reversed the imposition of the statutory penalty and the award of fees and costs, and "remanded for a determination of the amount of attorney fees and costs Lee may recover from Lucky, as the prevailing party" on the motion in light of our rulings. (*Id.* at p. 151.)

Fourth, we noted that "the trial court awarded Lee $4,860 out of the $22,303.75 Lee had requested for attorney fees and costs incurred in connection with his December 2008 motion, 'in view of the limited success of [the] motion.' Because we reverse the court's order as set forth herein, we remand for the further purpose of the trial court's reconsideration of the attorney fees and costs that Lee should recover in connection with his December 2008 motion." (*Lucky, supra,* 185 Cal.App.4th at p. 151.)

Finally, we awarded Lee his costs on appeal and remanded the matter "for further proceedings as set forth in this opinion and consistent with applicable law. (E.g., [§ 425.16(c)].)" (*Lucky, supra,* 185 Cal.App.4th at p. 152.)

E. *Post*-Lucky *Cost and Fee Awards, Tenders, and Other Motions*

The remittitur from *Lucky, supra,* 185 Cal.App.4th 125 issued on August 31, 2010, and was filed in the trial court on September 1. On September 1, Lee filed a memorandum of $2,747.69 in costs on appeal and a separate $275 cost memorandum. On September 15, Lucky paid these cost bills with interest.

On October 12, 2010, Lee filed a motion for "entry of order in compliance with court of appeal opinion." Lee asked the court to vacate the order acknowledging Lucky's satisfaction of judgment and the related statutory penalty and fee award. Lee also asked the court to award him (1) $22,303.75 in lodestar fees in lieu of the $4,860 awarded to him for bringing the December 2, 2008 motion; (2) $2,100 in lodestar fees incurred in enforcing the November 6, 2007 fee award; and (3) $335 that had been effectively deducted from his November 14, 2007 $424 cost award. He further asked the court increase the $22,303.75 and $2,100 lodestar fees by a 1.20 multiplier "to compensate for the delay in payment that occurred because of the erroneous rulings caused by Lucky," and by an additional 1.50 multiplier "because historical rates were used and because of the novelty, complexity [of the case] and the results achieved." Lee's October 12, 2010 motion also requested new cost and fee awards in the following amounts: (1) a lodestar amount of $87,510 in fees incurred since January 21, 2009, (2) a lodestar amount of $4,200 in fees for bringing the October 12, 2010 motion, (3) a 1.50 multiplier on both of these fee requests, and (4) $360 in costs incurred in bringing the October 12, 2010 motion. The trial court granted this motion in part and denied it in part in a January 31, 2011 written order that was later clarified in the court's July 26, 2011 order. The total amount of fees and costs awarded in the January 31, 2011 order was $64,073.70.

On February 1, 2011, Lucky mailed Lee a check for $64,108.80 with a cover letter stating, "Enclosed is full and complete payment of $64,073.70 pursuant to the Order, dated January 31, 2011, plus $35.10 for two (2) days of interest at 10% per annum." Lee returned the check with a letter stating, "On its face, this check is conditioned with the legally-operative statements: 'This is full and complete payment of this order dated January 31, 2011 . . . .' [¶] As you are aware, the conditions you have placed on my

client's cashing of this check are improper. . . . [Y]ou are (again) illegally attempting to target payments to specific orders. [¶] Any and all payments must be unconditional."

On February 1, 2011, Lee filed another motion for new costs and fees, apparently for work performed between October 1, 2010, and December 21, 2010, and for anticipated work to litigate the February 1, 2011 motion. He also requested $844.99 in additional costs. On March 24, 2011, the court awarded $3,555 in response to this motion.

On February 11, 2011, Lee sent Lucky a settlement offer. He calculated the total amount of fee and cost awards to date, excluding appellate court awards of costs on appeal, and calculated interest on the total retroactive to the date of the original judgment, June 26, 2007, after crediting Lucky's payments to date. He contended the amount then due was $131,422.39 and offered to settle the litigation for $111,422.39.

On March 16, 2011, Lucky sent Lee its own calculation of the amount due, with accrued interest and credits for past payments, and offered Lee a check for $70,656.47 as the total amount then due. Lucky wrote, "This tender is made in satisfaction of all sums that the debtors believe are due and owing as of the date of this letter." Lee asked if Lucky was making an unconditional tender and Lucky replied, "The check was tendered in full and complete satisfaction of all sums due and owing as of the date of that letter. Period." By letter dated March 21, Lee rejected the tender both because it was conditional and because it did not satisfy the total amount due.

On March 28, 2011, Lucky tendered Lee $3,559.85 as payment of the $3,555 awarded on March 24 plus interest "in full and complete payment" of the March 24 award, and argued that this tender plus the February 1 tender together constituted full satisfaction of judgment. Lee rejected the tender on April 4 because it was conditional and because it did not satisfy the judgment.

In March and April 2011, Lee took several steps to collect on his judgment. He applied for an order directing Shih to appear for a judgment debtor's examination; the order issued on March 3 and noticed an examination for March 30. On March 22, Lucky filed a motion to quash the judgment debtor's examination "subpoena" or, in the

alternative, a motion "for a determination of the remaining amount owed by judgment debtor." Lucky specifically asked the court to resolve the parties' dispute about how to calculate interest on the prior awards consistent with this court opinion in *Lucky, supra*, 185 Cal.App.4th 125. On March 28, Lee moved to compel responses to interrogatories that were served on Lucky in December 2007. On April 4, Lee moved "for an order compelling [Lucky] to unconditionally pay the undisputed amount owed to [Lee] and for the sheriff to take the money and deliver it to [Lee] if [Lucky] does not comply." On April 11, the clerk of the court issued a writ of execution for $108,597.55 plus $29.75 in daily interest. Lucky filed a motion to quash the writ of execution. On or about May 4, 2011, Lucky apparently filed an ex parte "motion to stay seizure of funds held by the Woo Family 2000 Trust at the Shanghai Commercial Bank until amount owed is determined by the court."

In the meantime, on March 28, 2011, Lee filed a "memorandum of costs after judgment, acknowledgment of credit, and declaration of accrued interest." He claimed $15,434 in new fees and costs that were incurred in February and March. Lucky moved to tax costs. In a June 2, 2011 order, the court granted the motion, explaining, "The costs were not reasonably incurred as Lee began enforcement no more than a few days after the last cycle of fee awards and as Lucky is willing to pay the full amount due once the dispute over interest is resolved."

On June 2, 2011, the court also denied Lee's motion for an order compelling payment of the undisputed amount owed. In addition, it denied Lee's motion to compel discovery responses from Lucky, granted Lucky's motion to quash the writ of execution, and stayed enforcement "to give Lucky an opportunity to voluntarily pay the amounts due once the interest dispute is resolved.

F. *July 26, 2011 Order Calculating Amount Owed*

On July 26, 2011, the court issued its calculation of interest and its decision on the amount Lucky still owed to Lee. The court applied *Lucky*'s statement that awards of prejudgment costs and fees are incorporated into the judgment and earn interest from the date of entry of the judgment. (*Lucky, supra,* 185 Cal.App.4th at pp. 137–138.) The

court then noted that *Lucky* stated that awards of postjudgment costs and fees incurred in the trial court in enforcing the judgment are also incorporated into the judgment and accrue 10 percent annual interest. (*Id.* at p. 138.) While *Lucky* did not explicitly state that interest on such awards accrues from the date of entry of judgment, the court concluded that "the best reading of *Lucky*" was that it did so. "While this has the counter-intuitive effect of requiring [Lucky] to pay interest accruing on fees and costs during a time in which they had not yet been incurred by Lee, this court is required to follow its best understanding of the Court of Appeal's holdings in *Lucky*."

Regarding awards of costs and fees that were incurred on appeal, the court first noted *Lucky*'s statements that an appellate court award of costs constitutes a separate judgment even though the amount of the award is determined on remand in the trial court, and the award accrues interest from the court rules on a motion to tax costs or upon expiration of the time to tax costs. (*Lucky, supra,* 185 Cal.App.4th at p. 138.) The court then noted that *Lucky* declined to decide whether a trial court award of costs or fees incurred on appeal pursuant to section 425.16(c) or other statutory authority constituted a separate judgment or was incorporated into the original judgment. (*Id.* at p. 139.) The court ruled that such awards "constitute separate judgments and accrue interest on the date they are given." The court commented, "This approach has the advantage of avoiding the inequitable result of interest accruing on an obligation before it is incurred, which would be the case if costs and fees on appeal related all the way back to the date of the original judgment."

The trial court identified six separate judgments in the case: (1) the June 26, 2007 dismissal of Lucky's cross-complaint against Lee; (2) an August 18, 2008 appellate award of costs in appeal No. A119134; (3) an August 20, 2008 award of section 425.16(c) costs and fees incurred in appeal No. A119134; (4) a December 16, 2008 appellate award of costs in appeal No. A120203; (5) a September 11, 2010 appellate award of costs in appeal No. A124965; and (6) a January 31, 2011 award of fees incurred on appeal No. A124965. Consistent with *Lucky*, the court ruled that the section 425.16(c) awards of prejudgment costs and fees were incorporated into the June 26, 2007 judgment

and accrued interest from that date. For other awards of fees and costs, the court allocated all or parts of the awards to one or more of the six judgments and calculated interest on those sums from the date of the respective judgment. The court also corrected or clarified portions of its prior orders, in particular the January 31, 2011 order. The court credited Lucky's payments to the various judgments and calculated, for judgment, the amount of principal and interest still due and the daily rate at which interest continued to accrue. According to the court's calculations, Lucky owed in total $69,415.25 in unpaid principal and $8,434.95 in unpaid interest as of the date of the order. The court ordered the $74,235.39 Lucky had on deposit with the court released to Lee, and ordered Lucky to pay the remaining amount due plus accrued interest. The court stayed enforcement efforts by Lee until August 23, 2011, to provide Lee a chance to file a supplemental motion for enforcement fees and costs.

On August 2, 2011, Lee filed this appeal challenging the court's June 2 and July 26 orders. Lucky filed a cross-appeal from the July 26 order. On about August 1, Lucky sent Lee a $4,185.35 payment, consisting of $3,614.81 (the difference between $77,850.20 and $74,235.39) and $570.54 in interest for 30 days to "allow time for the $74,235.39 to be released by the Clerk of the Court."[5]

II. DISCUSSION

Rather than address the issues raised in the appeal and cross-appeal separately, we will address issues raised in both as they logically arise in our review of the appealed orders.

[5] The parties have included in the record evidence of matters that occurred after the July 26, 2011 order that is the subject of their appeal and cross-appeal. This evidence is not properly included in the record on appeal. (See *In re Francisco W.* (2006) 139 Cal.App.4th 695, 706.) Therefore, we disregard the evidence in our consideration of this appeal; we grant Lee's motion to strike two of the exhibits from the respondent's appendix; and we deny Lucky's request that we take judicial notice of those same exhibits.

A. *Section 170.6 Issue*

We first address a jurisdictional challenge to the July 26, 2011 order that is raised in Lucky's cross-appeal. Lucky argues the order must be declared invalid because the trial judge who issued the orders lacked jurisdiction over the case.[6] According to Lucky, Judge Alvarado lacked jurisdiction to rule in the case because the trial court never assigned him—or any other judge—to the case after Lee filed a peremptory challenge against Judge Peter J. Busch on remand from the most recent appeal. We are unpersuaded.

1. *Background*

On September 1, 2010, the day the remittitur from *Lucky*, *supra*, 185 Cal.App.4th 125 was filed in the trial court, Lee filed a section 170.6 peremptory challenge to Judge Busch, who issued the February 6, 2009 order that was partially reversed in *Lucky*. (See § 170.6, subd. (a)(2) ["[a] motion under this paragraph may be made following reversal on appeal of a trial court's decision, or following reversal on appeal of a trial court's final judgment, if the trial judge in the prior proceeding is assigned to conduct a new trial on the matter"].) In the peremptory challenge, Lee characterized Judge Busch as "the judge before whom this action is pending for Law and Motion matters in Department 301."

[6] Lucky argues the January 31, March 24 and October 12, 2011 orders must be set aside on the same basis. This argument is not cognizable because Lucky did not timely appeal from those orders, which are not identified in the operative notice of cross-appeal. Each of these was an order finally awarding postjudgment costs and fees and thus was separately appealable pursuant to section 904.1, subdivision (a)(2). Failure to identify appealable orders in a notice of appeal deprives the appellate court of jurisdiction to review the orders. (*DeZerega v. Meggs* (2000) 83 Cal.App.4th 28, 43.) Although Lucky raises jurisdictional issues with respect to these orders, it does not challenge the court's jurisdiction to issue the orders in a fundamental sense, an issue that could be raised at any time. (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239.) Instead, Lucky argues that the orders are voidable as lacking jurisdiction in the broader sense of the term, as explained in *Abelleira v. District Court of Appeal* (1941) 17 Cal.2d 280, 287–290 (*Abelleira*). The latter type of jurisdictional challenge is subject to forfeiture for failure to take a timely appeal. (*Mission Housing Development Co. v. City and County of San Francisco* (1997) 59 Cal.App.4th 55, 66–67 (*Mission Housing*).) For these reasons, we grant Lee's motion for partial dismissal of Lucky's cross-appeal.

Lee requested "that this Court issue an order assigning this action to the other Law and Motion Department (Department 302) for further proceedings."[7] According to the register of actions filed with this appeal, no formal written order ever issued in response to this peremptory challenge. When Lee filed his October 12, 2010 motion for an order complying with the disposition in *Lucky, supra,* 185 Cal.App.4th 125 and for new awards of fees and costs, he noticed the motion for hearing in Department 302 on November 3, 2010.

On October 15, 2010, Lucky applied ex parte "for assignment of case to new judge after post-remittitur challenge by prevailing party." That application was denied, apparently by Presiding Judge James McBride and apparently based on a lack of notice to certain Lucky defendants. On October 19, Lucky applied ex parte for an order to take Lee's motion for attorney fees off calendar or to continue the hearing on the motion on the ground that no judge had yet been assigned to the case. Lucky argued, "Mr. Lee improperly brought his motion in this Court even though the case had not been assigned to this Court. [¶] . . . [¶] The matters before the Court now . . . are best handled not by a busy law and motion judge but by one trial judge for all purposes. [Assigning] Judge Busch would have made sense . . . . Since Mr. Lee has challenged him, however, the case must be assigned. [¶] . . . It has not been, and until it is, no judge has jurisdiction to hear further motions in the case." Lucky noticed its motion for hearing in Department 302, where Judge Charlotte Woolard apparently presided. On October 19, Judge Woolard granted the motion in part, continuing the hearing on Lee's fee motion to November 17 and establishing a briefing schedule on Lucky's motion. On October 20, 2010, Lucky applied ex parte for assignment of the case to a new judge or for an order

[7] In its writ petition, Lucky wrote that Lee filed this peremptory challenge "with the Presiding Judge, who controls the master calendar in San Francisco Superior Court." Lucky cited an exhibit to its writ petition that is not in the record of this appeal. The peremptory challenge itself does not indicate that it was filed with the presiding judge nor does the register of actions so indicate.

shortening time. Lee opposed the application, which was denied. On October 29, Lucky filed a peremptory challenge of Judge Woolard pursuant to section 170.6.

On November 15, 2010, Lucky filed a writ petition asking this court to order the trial court to assign the case to a single judge. We denied the petition on November 15. Assuming arguendo that Lucky had standing to challenge the court's inaction on Lee's peremptory challenge, we denied the petition on procedural grounds (failure to demonstrate exhaustion of trial court remedies such as the filing of noticed motions and an inadequate record). We also observed, "[N]othing in the record suggests that the superior court will fail to rule on any pending peremptory challenges prior to the commencement of the November 17, 2010 hearing."

On November 15, the hearing on Lee's October 12, 2010 motion was continued "on the court's own motion" to November 22 in Department 302 before Judge Alvarado. Judge Alvarado ultimately held hearings on Lee's motion, ruled on that motion, and issued all of the other rulings that are being challenged in this appeal and cross-appeal.

2. *Analysis*

Section 170.6, subdivision (a) provides in relevant part: "(1) A judge . . . shall not try a civil or criminal action or special proceeding of any kind or character nor hear any matter therein that involves a contested issue of law or fact when it is established as provided in this section that the judge . . . is prejudiced against a party or attorney or the interest of a party or attorney appearing in the action or proceeding. [¶] . . . [¶] (4) If the motion is duly presented, and the affidavit or declaration under penalty of perjury is duly filed or an oral statement under oath is duly made, thereupon and without any further act or proof, *the judge supervising the master calendar, if any, shall assign some other judge . . . to try the cause or hear the matter. In other cases, the trial of the cause or the hearing of the matter shall be assigned or transferred to another judge* . . . of the court in which the trial or matter is pending . . . ." (Italics added.)

Lucky argues the July 26, 2011 order is voidable because it was issued by a judge that lacked jurisdiction over the case. We disagree. Lucky relies on authority that courts lack jurisdiction in the broad sense of the word (as distinguished from fundamental

personal or subject matter jurisdiction) when they fail to follow certain mandatory statutory procedures. Orders that are issued despite this type of jurisdictional defect are voidable, but not void. They may be set aside when timely challenged, but are subject to waiver, forfeiture and estoppel. In contrast, orders issued despite a lack of fundamental jurisdiction are void and may be set aside at any time. (See *Abelleira, supra,* 17 Cal.2d at pp. 288–289; *People v. National Automobile & Casualty Ins. Co.* (2000) 82 Cal.App.4th 120, 125–126; *Mission Housing, supra,* 59 Cal.App.4th at p. 67.) A judge who is the subject of a timely peremptory challenge lacks jurisdiction in the broad sense of the term and any orders he or she makes after the challenge are voidable. (See *Betz v. Pankow* (1993) 16 Cal.App.4th 931, 939–940.) This rule, however, is inapplicable here because neither Judge Busch nor Judge Woolard (the judges who were subjects of timely peremptory challenges) ruled on the merits of any issue in the case after the challenges were filed. Lucky does not argue to the contrary.

Lucky instead argues that Presiding Judge McBride failed to fulfill his statutory duty to "assign some other judge . . . to try the cause or hear the matter." (§ 170.6, subd. (a)(4); see also rule 10.603(c)(1)(E) ["presiding judge must . . . [¶] . . .[¶] . . . [d]esignate a judge to act if by law or the rules of court a matter is required to be presented to or heard by a particular judge and that judge is absent, deceased, or unable to act"].) Lucky argues this language requires an assignment to a single judge for all purposes. Lucky does not support this strained construction of the statutory language with legislative history or case law. We find it wholly unpersuasive. The statute simply requires an "assign[ment]." Just such an assignment occurred when Lee's pending motion was assigned to be heard by Judge Alvarado on November 17, 2011. Lucky has not established a violation of section 170.6, much less a jurisdictional defect rendering the July 26, 2011 voidable.

B. *Accrual of Interest on Cost and Fee Awards*

We now turn to the crux of this appeal: the question of when interest starts to accrue on cost and fee awards that are entered postjudgment. Lee argues that *Lucky* compels the conclusion that, with the exception of appellate court awards of costs on

appeal, all postjudgment cost and fee awards (regardless of whether the fees were incurred before or after judgment) accrue interest from the date of entry of the original judgment. He argues the trial court erred by treating trial court awards of costs and fees incurred on appeal as separate judgments and calculating interest on those awards from the dates the awards were entered. He also faults the trial court for allocating various cost and fee awards to multiple judgments. Lucky urges us to disapprove our statement in *Lucky* that awards of prejudgment costs and fees accrue interest retroactive to the date of entry of judgment and language in *Lucky* which, he contends, implies that the same rule applies to awards of postjudgment costs and fees. Lucky argues a consistent rule that cost and fee awards accrue interest from the dates of the awards themselves would both be more just—avoiding the accrual of interest on cost and fee awards before the costs and fees had even been incurred—and more practical to apply. Lucky criticizes the trial court for awarding any retroactive interest and for adopting a methodology that required allocation of cost and fee awards to multiple judgments. We conclude that Lucky's proposed approach for postjudgment trial court awards of costs and fees incurred after judgment is the correct one and reject any inconsistent reading of *Lucky*.

1. *Fees and Costs Incurred Before Judgment*

As previously noted, *Lucky* stated: "Where costs are established by the judgment, but the amount of the award is ascertained at a later time, the court clerk enters the costs on the judgment after the amount is determined. ([Rule] 3.1700(b)(4); *Bankes v. Lucas*[, *supra*,] 9 Cal.App.4th [at p.] 369.) In other words, the amount of the cost award is incorporated into the judgment. [¶] Interest at the rate of 10 percent per annum accrues on the unpaid principal amount of the judgment (§ 685.010[, subd. (a)]), including the amount of the cost award and attorney fees award (§ 680.300), as of the date of judgment entry (§ 685.020, subd. (a)). Therefore, *interest ordinarily begins to accrue on the prejudgment cost and attorney fees portion of the judgment as of the same time it begins to accrue on all other monetary portions of the judgment—upon entry of judgment.* (See *Sternwest Corp. v. Ash*[, *supra*,] 183 Cal.App.3d [at pp.] 76–77 [once attorney fee award is determined by the trial court, it is added to the judgment, and the total judgment bears

statutory postjudgment interest until paid].)" (*Lucky*, *supra*, 185 Cal.App.4th at pp. 137–138, italics added.)

Lucky urges us to revisit this issue and reach a different conclusion. We conclude, however, that we are bound to follow our prior ruling on the issue under the doctrine of law of the case. " 'The doctrine of "law of the case" deals with the effect of the first appellate decision on the subsequent retrial or appeal: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case.' [Citations.] But, the 'discussion or determination of a point not necessary to the disposition of a question that is decisive of the appeal is generally recorded as obiter dictum and not as the law of the case.' [Citation.] 'It is fundamental that the point relied upon as law of the case must have been necessarily involved in the case.' [Citation.]" (*Gyerman v. United States Lines Co.* (1972) 7 Cal.3d 488, 498, italics omitted.)

Arguably, our statements in *Lucky* about the accrual of interest on awards of prejudgment costs and fees were not necessary to our decisions in that appeal. However, " '[a] decision on a matter properly presented on a prior appeal becomes the law of the case even though it may not have been absolutely necessary to the determination of the question whether the judgment appealed from should be reversed. [Citations.]' (*Steelduct Co. v. Henger-Seltzer Co.* (1945) 26 Cal.2d 634, 643.) Thus, application of the law-of-the-case doctrine is appropriate where an issue presented and decided in the prior appeal, even if not essential to the appellate disposition, 'was proper as a guide to the court below on a new trial.' [Citation.]" (*People v. Boyer* (2006) 38 Cal.4th 412, 442, parallel citation omitted.) There is no question that our statements were intended to guide the trial court on remand, when the issue of interest on the award was almost certain to arise. The trial court certainly understood itself to be bound by those statements on remand. In these circumstances, we conclude that application of the law of the case doctrine is appropriate here, and we will not revisit *Lucky*'s ruling on the accrual of interest on awards of prejudgment costs and fees.

2. *Fees and Costs Incurred After Judgment*

In *Lucky*, we held that awards of fees and costs incurred in postjudgment enforcement efforts are incorporated into the principal amount of the judgment and earn 10 percent interest per annum. We did not take a position on when such interest starts to accrue. (*Lucky*, *supra*, 185 Cal.App.4th at p. 138.) The trial court read *Lucky* to compel the conclusion that interest on awards of postjudgment fees and costs also ran from the date of entry of judgment. We now conclude, however, that postjudgment interest on such awards runs from the date the amount of the fee award is fixed, not from the date of the original judgment.

First, the statutory scheme does not clearly provide that interest on awards of postjudgment costs and fees runs from the date of entry of judgment. Section 680.300 defines "principal amount of the judgment" to mean "the total amount of the judgment as entered or as last renewed, together with the costs thereafter added to the judgment pursuant to Section 685.090, reduced by any partial satisfactions of such amount and costs and by any amounts no longer enforceable." Section 685.090 in turn provides that "[c]osts are added to and become a part of the judgment: [¶] (1) [u]pon the filing of an order allowing the costs . . . ." (§ 685.090, subd. (a)(1).) That the costs are incorporated into the judgment does not dictate that the awards accrue interest from the date of entry of judgment. Section 685.090, subdivision (b)—which provides that "[t]he costs added to the judgment pursuant to this section are included in the principal amount of the judgment *remaining unsatisfied*" (italics added)—suggests the contrary, that the cost award is added to the judgment *as of the date of entry of the cost award* (i.e., the judgment remaining unsatisfied *at that time*) and thus would logically start to accrue interest on the date. Under the trial court's approach in this case, the cost award was added to the principal amount of the judgment as of the date of the judgment, regardless of the whether any part of the judgment had already been satisfied; interest was

calculated on that total amount from the date of entry of judgment, and partial satisfactions of the judgment were *thereafter* credited against the amounts due.[8]

Second, principles that govern awards of interest on judgments under this state's law support a rule that interest on postjudgment awards of costs and fees incurred after judgment starts to accrue on the date of entry of the awards.

In an early decision, the Supreme Court provided the following rationale for an award of postjudgment interest: "[T]he judgment in the case before us *fixed the liability of the defendant*, and from that date the money to which the plaintiff was entitled was detained from it, and natural justice, as well as the statute which provides that interest . . . is payable on judgments recovered in the courts of this state, justifies the judgment relating to interest [citation] . . . ." (*Columbia Sav. Bank v. Los Angeles* (1902) 137 Cal. 467, 471 (*Columbia*), italics added; see also *Los Angeles R. & G. Co. v. Los Angeles* (1933) 132 Cal.App. 262, 264 [quoting and relying on this passage from *Columbia*].) Similarly, prejudgment interest is generally denied "because of the general equitable principle that a person *who does not know what sum is owed* cannot be in default for failure to pay. [Citation.]" (*Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 906 (*Chesapeake*), italics added.) However, an exception to this general rule comes into play when damages are "certain, or capable of being made certain by calculation, and the right to recover . . . is vested in [the claimant] upon a particular day . . . ." (Civ. Code, § 3287, subd. (a); *Chesapeake*, at p. 907.) This principle—that interest starts to accrue on the date that the amount owed has been fixed or can be determined with certainty—is consistent with a rule that allows interest to accrue on a cost or fee award when the award is entered, rather than from entry of the

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[8] Although we reached a different conclusion in *Lucky* about commencement of interest with respect to awards of prejudgment costs and fees (*Lucky, supra,* 185 Cal.App.4th at pp. 137–138), we have explained *ante* that we adhere to that conclusion as law of the case. We further note the important distinction that such costs and fees were *incurred* before entry of judgment. Generally, when a judgment includes an award of costs and fees, the amount of the award is left blank for future determination and such awards are later entered nunc pro tunc. (See *Bankes v. Lucas, supra,* 9 Cal.App.4th at p. 369.)

original judgment, when the amount of the awards was not merely unknown, but the postjudgment costs and fees had not even been incurred.

This principle and rule are also consistent with case law addressing the effect of appellate court changes to cost and fee awards: a judgment that has been *modified* on appeal accrues interest from the original date of entry of the judgment, but a judgment that has been *reversed* on appeal accrues interest from the date of entry of a new judgment following remand. (See *Stockton Theatres, Inc. v. Palermo* (1961) 55 Cal.2d 439, 442–443 (*Stockton Theatres*); *Snapp v. State Farm Fire & Cas. Co.*(1964) 60 Cal.2d 816, 817–820 (*Snapp*).) "It is not the form of the order on the first appeal that controls, but the substance of that order." (*Snapp,* at p. 821.) In *Stockton Theatres*, the Supreme Court explained that a true reversal occurred when, in a prior appeal, it reversed a trial court order disallowing a surety bond as an item of costs and instructed the trial court to hold a hearing on the need for the bond and to award the costs if it found the bond was necessary. (*Stockton Theatres*, at p. 443.) In contrast, when the Supreme Court later reversed the trial court's finding on remand that the bond was unnecessary, a modification occurred: "[A]s a matter of law, the evidence demonstrated that the expenditure was necessary and . . . the [trial] court should have allowed this item of costs. The legal effect of this [appellate court ruling] was to make the [trial court order on remand] state what it should have stated on the date [of the order on remand]. In a very real sense, in legal effect, it . . . determined that, after showing necessity, plaintiff was entitled to this award as of [the date of the order on remand]." (*Stockton Theatres*, at p. 443.) In *Snapp,* the Court of Appeal reversed a trial court order that an insurer was liable only for $8,168.25 in damage that occurred during the policy period. The appellate court concluded the insurer was also liable for damages that occurred later but were caused by factors operative during the policy period. (*Snapp*, at pp. 817–818.) "Since the [trial court] findings were explicit that the damage occurring after the termination date exceeded $25,000 [(the policy limit)], and was caused by factors existing and operative before the termination date, the Court of Appeal ruled that, as a matter of law, the insurance company was liable . . . for $25,000." (*Id.* at p. 818.) The Supreme Court

held the appellate court ruling was a modification rather than a reversal: "The obligation to pay at least $8,168.25 . . . was not set aside and vacated . . . . The legal effect of that reversal was to determine that as of the date of the original judgment plaintiffs were entitled to $25,000 . . . , based solely on the record then before the appellate court. No issues remained to be determined. No further evidence was necessary." (*Id.* at p. 820.)

These cases may be understood to hold that interest accrues from the date that the trial court fixes the amount due or errs in fixing the amount due but that error is corrected on appeal without the need for further factfinding in the trial court. When, on the other hand, the amount due is not and cannot be fixed until after further factfinding on remand from appellate review, interest does not accrue until the final determination is made. In either case, it is the correct fixing of the amount of the award that triggers the accrual of interest.

In sum, we now conclude that interest on an award of costs and fees that were *incurred* postjudgment accrues from the date the award is entered, not from the date of entry of the original judgment.

3. *Fees and Costs Incurred on Appeal*

In *Lucky*, we held that an appellate court award of costs on appeal constitutes a separate judgment. (*Lucky, supra,* 185 Cal.App.4th at p. 138; see *Supera v. Moreland Sales Corp.* (1938) 28 Cal.App.2d 517, 521.) Neither party disputes this conclusion. We declined to rule, however, on whether a *trial court* award of costs and fees incurred on appeal—for example, an award of such costs and fees made pursuant to section 425.16(c) as was done here—is incorporated into the original judgment or constitutes an independent judgment. (*Lucky,* at p. 139.) We wrote that the matter was "not entirely clear" and noted authority that such awards are not dependent on whether the appellate court awarded costs on appeal (*Carpenter v. Jack in the Box Corp., supra,* 151 Cal.App.4th at p. 461) and that an award of fees on appeal in an eminent domain proceeding pursuant to section 1268.720—which is awarded a the discretion of the appellate court—does not affect the finality of the underlying judgment (*Los Angeles Unified School Dist., supra,* 89 Cal.App.4th at p. 1419). (*Lucky,* at p. 139.) We conclude

that trial court awards of costs and fees incurred on appeal do not constitute separate judgments. Rather, they are incorporated into the original trial court judgment as are all other awards of costs and fees and, as with all other such awards, earn interest from the date the awards are entered.

The rule that appellate court cost awards constitute separate judgments is grounded both in statutory language and in rationales that do not apply to appellate cost and fee awards under section 425.16(c). First, rule 8.278(b) requires the Court of Appeal clerk to enter a "judgment awarding costs" as provided in that rule, and rule 8.278(c)(3) provides, "An award of [rule 8.278] costs is enforceable as a money judgment."[9] No statute or rule similarly provides that an award of costs or fees incurred on appeal pursuant to other statutory authority (such as section 425.16(c)) is enforceable as a separate money judgment. Second, one rationale for the separate judgment rule is that the appellate court, rather than the trial court, is the source of an award of costs on appeal pursuant to rule 8.278: "It is a complete judgment in itself that finds its origin in the order of an appellate or the Supreme Court . . . . The right to such judgment comes into being when the order of the reviewing court becomes final. The judgment itself is created when the successful party files his cost bill and his costs are taxed." (*Supera v. Moreland Sales Corp., supra,* 28 Cal.App.2d at p. 521.) Accordingly, it is conceptually separate from the underlying trial court judgment. The same cannot be said of a *trial court* award of costs and fees incurred on appeal. Third, one apparent purpose of the separate judgment rule for appellate cost awards is to allow a litigant to collect the costs without having to wait until the termination of potentially lengthy proceedings on remand, which could not affect its entitlement to the appellate costs. As Witkin explains: "[A]fter appeal, there may be a new trial with even a further appeal, and the proceedings

[9] Former rule 26(d) provided that an award of costs on appeal could "be enforced in the same manner as a money judgment." (*Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 972 ["an award of costs on appeal is independent from the final judgment in the case and therefore may be enforced, if desirable or necessary, as a separate judgment"].)

may cover a long period of time. Accordingly, the award of costs on appeal, when properly allowed in the trial court, represents an independent judgment, enforceable by any available means. . . . Indeed, to avoid oppression, the trial court may stay the retrial of a case reversed on appeal until costs are paid. (See *Weile v. Sturtevant* (1917) 176 [Cal.] 767, 768.)" (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 978, p. 1026, parallel citation omitted.) While the *appellate court's* award of costs on appeal might be unjustifiably frustrated by delay if the award were incorporated into the underlying judgment rather than standing as a separate, immediately-enforceable judgment, the same is not necessarily true of a trial court award of costs and fees incurred on appeal. Here, for example, the trial court awarded additional costs and fees pursuant to section 425.16(c), which authorizes such an award to the prevailing party on an anti-SLAPP motion. If the appeals court had remanded the case for a new hearing on the anti-SLAPP motion, an award of appellate costs and fees under the statute might be premature.

In sum, there is no statutory or regulatory authority for treating a trial court award of costs and fees incurred on appeal as a separate judgment and the rationales for the separate judgment rule as to appellate awards of costs on appeal do not naturally apply to trial court awards. We conclude that the better approach is to follow the general rule that postjudgment awards of costs and fees in the trial court are incorporated into the underlying judgment for enforcement purposes. However, for the reasons stated *ante*, interest on these awards run from the date the awards are entered, not from the date of entry of the underlying judgment.

C. *Additional Matters Affecting Calculation of Principal and Interest in this Case*

1. *Waiver or Forfeiture of Retroactive Interest on Prejudgment Costs and Fees*

Lucky argues on appeal, as it did in the trial court, that Lee waived or forfeited its claim to retroactive interest (i.e., interest for the period between entry of judgment and entry of the fee award), or should be estopped from claiming such interest, on the November 6, 2007 award of prejudgment costs and fees. The trial court held an award of

such retroactive interest was not barred by estoppel on the ground that Lee had not requested retroactive interest in his pre-*Lucky* cost and fee requests. The court observed that, unlike prejudgment interest which must be requested at the time judgment is entered, postjudgment fee and costs awards are "incorporated into the original judgment as a matter of law regardless of whether [the judgment] so states."

Lucky first argues that Lee forfeited his claim to retroactive interest because he did not claim such interest when he calculated the total amount Lucky owed him in December 2008, or when he appealed from the February 6, 2009 order, which did not include retroactive interest.[10] Lucky notes that, ordinarily, arguments not raised in the trial court are forfeited for purposes of appeal. (See *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 799–800.) However, the date upon which postjudgment interest accrues is a pure question of law and we have to discretion to decide such legal issues for the first time on appeal. (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) We addressed and decided the issue in *Lucky, supra,* 185 Cal.App.4th 125 and Lee properly claimed the interest on remand. Lucky faults Lee for not claiming retroactive interest in the first motion he filed on remand from *Lucky*. However, that motion sought correction of prior cost and fee awards consistent with our rulings in *Lucky* and awards of additional costs and fees that Lee had incurred; it did not address interest. Lee demanded retroactive interest when he plainly addressed the issue in his February 11, 2011 settlement offer to Lucky.

Lucky next argues that Lee should be estopped from claiming retroactive interest on this award because he is "now taking a position inconsistent with that which he took before Judge Busch and Judge Alvarado." However, judicial estoppel applies only if a party *successfully* takes one position and then seeks to gain an advantage by taking an *incompatible* position. (*Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal.App.4th 1295, 1314.) Lee's request for postjudgment interest from the date of entry of the cost

[10] As Lucky acknowledges, however, Lee did request that the award of prejudgment costs and fees be entered nunc pro tunc, which would have had the effect of awarding him retroactive interest.

and fee awards in his motion to Judge Busch was not *incompatible* with a request for additional interest retroactive to the date of entry of the underlying judgment, and Lee's requests for multipliers in motions addressed to Judge Alvarado were not successful.

Finally, Lucky argues Lee waived his claims to retroactive interest under section 2076 and Civil Code section 1501. Section 2076 provides: "The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards." Civil Code section 1501 provides, "All objections to the mode of an offer of performance, which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated." These statutes provide for the waiver of *objections to tender*. They do not provide for waiver of a party's *entitlement to payment* of amounts due upon rejection of a tender, and Lucky cites no legal authority that the statutes have that effect. Here, Lucky faults Lee for failing to demand retroactive interest when he objected to Lucky's pre-*Lucky* tenders.[11] Lee did, however, raise other objections to those tenders. In *Lucky*, we held those other objections were valid and the tenders therefore were ineffective. It is thus inconsequential that Lee did not also raise an objection on the ground that the tenders did not include retroactive interest on the awards of prejudgment costs and fees.

We find no merit in Lucky's arguments that Lee waived or forfeited his claim to retroactive interest on the award of prejudgment costs and fees or that he is estopped from claiming such interest.

[11] Lucky refers to Lee's objections to Lucky's tenders up to and including the motion cycle resulting in the January 31, 2011 order. Lucky made no tenders on remand until February 2011; therefore, Lucky's argument pertains only to pre-*Lucky* tenders.

2. *Effect of March 16, 2011 Tender*

Lucky argues its March 16, 2011 tender of $70,656.47 covered the full amount of the principal and accrued interest on the judgment as of that date and therefore suspended the accrual of interest on the principal from that date forward.

The only authority Lucky cites in support of this argument is *General Ins. Co. v. Mammoth Vista Owners' Assn.* (1985) 174 Cal.App.3d 810 (*General Insurance*), which in turn relies on *Ferrea v. Tubbs* (1899) 125 Cal. 687 (*Ferrea*) and *Beeler v. American Trust Co.* (1946) 28 Cal.2d 435 (*Beeler*). (See *General Insurance*, at p. 829.) *Ferrea* (which is followed in *Beeler*) bases its ruling on sections of the Civil Code that govern the effect of tender on debts generally. (See Civ. Code, §§ 1485–1505; Code Civ. Proc., §§ 2074–2076.)[12]

Civil Code section 1504 provides: "An offer of payment or other performance, duly made, though the title to the thing offered be not transferred to the creditor, stops the running of interest on the obligation, and has the same effect upon all its incidents as a performance thereof." To be effective, tender must be of full performance (Civ. Code, § 1486) and must be "free from any conditions which the creditor is not bound, on his part, to perform" (Civ. Code, § 1494). In our discussion of the proper calculation of principal and interest on the judgments in this case *post*, we conclude that Lucky's

[12] Lucky does not cite or rely on a provision of the Enforcement of Judgments Law (EJL; § 680.010 et seq.) that, unlike these Civil Code provisions (see Civ. Code, § 1486), appears to provide that tender in *partial* satisfaction of judgment stops the accrual of interest on that part of the judgment. (§ 685.030, subd. (c) ["[i]f a money judgment is partially satisfied pursuant to a writ under this title or is otherwise partially satisfied, interest ceases to accrue as to the part satisfied on the date the part is satisfied"]; (§ 685.030, subd. (d)(2) [tender may constitute partial satisfaction of judgment within the meaning of § 685.030, subd. (c)].) Lucky does not argue on appeal, and does not demonstrate that it argued below, that in the event the court determined its tenders did not fully satisfy the amounts due they should nevertheless have partially stopped the accrual of interest. Therefore, any such argument is forfeited. (See *Title G. & T. Co. v. Fraternal Finance Co.* (1934) 220 Cal. 362, 363 [appellate courts "will notice only those assignments pointed out in the brief of an appellant, all others are deemed to have been waived or abandoned"].)

March 16, 2011 tender would have fully satisfied the outstanding amounts of principal and interest then due. However, the parties dispute whether the tender was impermissibly conditional.

On March 16, 2011, Lucky tendered to Lee $70,656.47 as the total amount then owed. Lucky noted that the figure appeared to include double counting of two cost items valued at $425 and $1,008.70, but agreed to waive any claim of double counting if Lee accepted the tender. Lee responded, "Your 'tender' is decidedly ambiguous. For instance, your letter presents numerous arguments and states that the 'tender is made in satisfaction of all sums that the debtors believe are due and owing.' [¶] Yes or no, is the $70,675.54 check tendered unconditionally? Please respond with a 'yes' or 'no' forthwith." Lucky replied: "There was absolutely nothing ambiguous about the tender letter. This is a classic, straightforward tender offer. The check was tendered in full and complete satisfaction of all sums due and owing as of the date of that letter. Period." By letter dated March 21, Lee rejected the tender both because it was conditional and because it did not satisfy the total amount due.

Ferrea is directly on point. The defendants in that case tendered the full amount of the judgment, with accrued interest and costs, and asked the plaintiff to "deliver a receipt for said money 'as payment in full for said judgment, with interest and costs.' " (*Ferrea, supra,* 125 Cal. at p. 690.) Rejecting the argument that the tender was impermissibly conditional under Civil Code section 1494, the Supreme Court explained, "[A] receipt may be demanded without jeopardizing the legality of the tender. Our code provides: 'When a debtor is entitled to the performance of a condition precedent to, or concurrent with, performance on his part, he may make his offer to depend upon the due performance of such condition.' (Civ. Code, [§] 1498.) 'A debtor has a right to require from his creditor a written receipt for any property delivered in performance of his obligation.' (Civ. Code, [§] 1499.) . . . And by virtue of section 1494 the offer of performance need only be free from conditions which the creditor is not bound to perform. If the debtor tender a sufficient amount of money, he is entitled to a receipt in full, and may couple his tender with a demand for such receipt." (*Ferrea,* at p. 690; see

also *Montano v. City of South Gate* (1970) 13 Cal.App.3d 446, 449 [citing *Ferrea* and holding that tender " 'for the settlement of Edward Joseph Montano's judgment' " was unconditional within the meaning of Civ. Code, § 1494].)

In *Ferrea*, tender was made pending the plaintiff's appeal of the judgment and the plaintiff's acceptance of it would have resulted in dismissal of the appeal. (*Ferrea, supra,* 125 Cal. at p. 691.) Nevertheless, the tender was effective in suspending the accrual of interest: "Plaintiff could refuse to accept the tender, and prosecute his appeal, but he thereby assumed the risk of losing the use of this money pending the appeal in case of an affirmance of the judgment." (*Id.* at p. 692.) Because the judgment was affirmed, the tender turned out to be effective in suspending the accrual of interest as it fully satisfied the judgment and was free from conditions the plaintiff was not bound to accept. (*Ibid.*) The situation in this case is similar. Lucky tendered the $70,675.54 check in full satisfaction of the judgment. Lee was free to refuse the check to avoid effecting an accord and satisfaction (see *Lucky*, *supra*, 185 Cal.App.4th at pp. 148–151), but he thereby assumed the risk of losing use of that money without compensating interest payments if it turned out that the tender was in fact in full satisfaction of the judgment. As we explain further *post*, we conclude the March 16, 2011 tender was in full satisfaction of the principal and interest on the judgment then due. Accordingly, no interest accrued on that principal amount after March 16.

3. *Challenge to March 24, 2011 Fee and Cost Award*

Lucky argues on cross-appeal that the trial court erred in awarding $3,555 in costs and fees in its March 24, 2011 order. The March 24 order was separately appealable as a postjudgment order. (§ 904.1, subd. (a)(2).) Therefore, it had to be specifically identified in the notice of appeal. (*Sole Energy Co. v. Petrominerals Corp.* (2005) 128 Cal.App.4th 212, 239.) Lucky's notice of cross-appeal names only the July 26, 2011 order as the subject of the cross-appeal. The notice does not mention the March 24 order and cannot reasonably be construed to encompass that order. (See *id.* at 240.) As Lee correctly argues, and as already noted *ante*, because Lucky never appealed from the March 24 order, we have no jurisdiction to review it.

4. *Denial of March 28, 2011 Fee and Cost Request*

Lee challenges the trial court's denial of his March 28, 2011 memorandum of costs, in which he claimed $15,434 in new fees and costs incurred in February and March 2011 enforcement efforts. The trial court granted Lucky's motion to tax the cost memorandum in its entirety because "Lee began enforcement no more than a few days after the last cycle of fee awards and as Lucky is willing to pay the full amount due once the dispute over interest is resolved." Lee expressly appealed from this June 2 order.

Section 685.040 provides: "The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law." Section 425.16(c) authorizes awards not only of fees directly incurred in bringing a successful anti-SLAPP motion, but also fees incurred in seeking a section 425.16(c) fee award, defending a section 425.16(c) award on appeal, or enforcing a section 425.16(c) award. (*Ketchum*, *supra*, 24 Cal.4th at p. 1141 & fn. 6.) A judgment creditor may claim certain enforcement costs, including fees allowable under section 685.040,[13] by cost memorandum. (§ 685.070, subd. (a).) The cost memorandum must be filed "[b]efore the judgment is fully satisfied." (§ 685.070, subd. (b).)

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[13] Those costs are: "(1) Statutory fees for preparing and issuing, and recording and indexing, an abstract of judgment or a certified copy of a judgment. [¶] (2) Statutory fees for filing a notice of judgment lien on personal property. [¶] (3) Statutory fees for issuing a writ for the enforcement of the judgment to the extent that the fees are not satisfied pursuant to Section 685.050. [¶] (4) Statutory costs of the levying officer for performing the duties under a writ to the extent that the costs are not satisfied pursuant to Section 685.050 and the statutory fee of the levying officer for performing the duties under the Wage Garnishment Law to the extent that the fee has not been satisfied pursuant to the wage garnishment. [¶] (5) Costs incurred in connection with any proceeding under Chapter 6 (commencing with Section 708.010) of Division 2 that have been approved as to amount, reasonableness, and necessity by the judge or referee conducting the proceeding. [¶] (6) Attorney's fees, if allowed by Section 685.040." (§ 685.070, subd. (a).)

Lee's cost memorandum claimed the following: (1) $25 to prepare and issue an abstract of judgment on March 8, 2011; (2) $19 to record and index an abstract of judgment on March 8; (3) $10 to file a notice of judgment lien on personal property on

In the trial court, Lee argued that an "award of attorneys' fees and costs incurred is mandatory. (See [*Ketchum, supra,*] 24 Cal.4th [at p.] 1141 & [fn.] 6.) The 48.6 requested hours is *de jure* reasonable and supported by invoices and the work product filed in this Court." *Ketchum* does not support this argument. The case does hold that "any SLAPP defendant who brings a successful motion to strike is entitled to *mandatory* attorney fees." (*Ketchum*, at p. 1131, italics added.) However, it also holds that section 425.16(c) fees should be calculated using the lodestar approach and that under the lodestar approach compensation is awarded "for *all* the hours *reasonably spent*, including those relating solely to the fee." (*Ketchum*, at p. 1133.) It follows that an award of fees for hours *not* reasonably spent in bringing the anti-SLAPP motion, seeking fees, or enforcing a fee award (see *id.* at p. 1141 & fn. 6) is *not* mandatory.

On appeal, Lee cites *Lucky* as authority that the trial court's denial of these enforcement fees was unreasonable. He quotes *Lucky's* statement that "there *is* a judgment in the case, which permits Lee to enforce the amounts Lucky owes him" (*Lucky, supra,* 185 Cal.App.4th at p. 144) and uses this case citation to support his arguments that "[a] judgment creditor is allowed as a matter of law to enforce his judgment"; "there was and is no legal mandate that Lee delay judgment enforceable"; and "[u]nder the applicable law, Lee had the statutory right to record an abstract of judgment to perfect a real property lien." In doing so, Lee badly misrepresents *Lucky*'s analysis. In the cited passage, we rejected Lucky's argument that Lee's December 2, 2008 request for fees that were incurred in enforcing the November 6, 2007 order (itself a fee award) was properly denied because the fee request was filed after Lucky had satisfied the award. (*Id.* at pp. 140–141.) One of Lucky's arguments was that section 685.080, subdivision (a), which provides that a motion for fees must be filed "before the judgment is satisfied in full" should be construed to mean "before the [judgment or order] is

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March 27; (4) $40 for "[a]pproved fee on application for order for appearance of judgment debtor, or other approved costs under . . . § 708.010 et seq."; (5) $490 in filing and messenger costs pursuant to sections 425.16(c) and 685.070; and (6) $14,850 in attorney fees incurred between February 1 and March 27 pursuant to section 685.040.

satisfied in full." (*Lucky*, at pp. 143–144.) We wrote, "While California's [EJL] provides that the word 'judgment' means 'a judgment, order, or decree entered in a court of this state' (§ 680.230), litigants do not have license to substitute the word 'order' everywhere the word 'judgment' appears in the EJL, regardless of the circumstances or statutory intent. The ostensible purpose of the broad definition of 'judgment' in section 680.230 is to permit an order awarding fees to be enforced under the EJL where there is no judgment. [Citations.] . . . In the matter before us, by contrast, there *is* a judgment in the case, which permits Lee to collect the amounts Lucky owes him." (*Lucky*, at pp. 143–144.) In short, we held that where a judgment has been entered in a particular case, "judgment" in section 685.080, subdivision (a) means "judgment" and not "judgment, order or decree." We did not hold that whenever a judgment has been entered and has not been satisfied in full, the judgment creditor is entitled as a matter of law to reimbursement for fees and costs incurred in any and all enforcement efforts, regardless of whether those efforts were reasonable.

As noted, section 685.040 provides that a judgment creditor is entitled to "reasonable and necessary" costs of enforcing a judgment, and section 425.16(c) also includes a reasonableness element. Where a statute provides that a prevailing party is *entitled* to costs and fees, and the only disputed issue is whether the costs and fees were reasonably incurred, our review is for abuse of discretion. (*Levy v. Toyota Motor Sales, U.S.A., Inc.* (1992) 4 Cal.App.4th 807, 813; see also *Ladas v. California State Auto. Assn.* (1993) 19 Cal.App.4th 761, 774 ["[w]hether a cost item was reasonably necessary to the litigation presents a question of fact for the trial court and its decision is reviewed for abuse of discretion"].)

We find no abuse of discretion here. At the May 19, 2011 hearing on the motion, the court explained its ruling by stating that the case had been "litigated to the extreme," taking many hours of the judge's and court staff's time to resolve the matter, which the parties should have been able to resolve in good faith negotiations. It has often been observed that the trial judge is in the best position to evaluate the reasonableness and necessity of legal work performed the judge's own court. " 'The court may consider the

nature of the litigation, its difficulty, the amount involved in the litigation, the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, the attorney's learning and experience, the intricacies and importance of the litigation, the labor necessary and the time consumed. [Citation.] We will reverse only if the amount awarded is so large or small that we are convinced it is clearly wrong.' [Citation.]" (*Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 427–428.) Here, Judge Alvarado considered the nature of the litigation (an anti-SLAPP motion that fairly quickly resulted in dismissal of the complaint, followed by years of litigation over fees), the amount involved in the litigation (in its entirety, the judgment consists of cost and fee awards and accrued interest), the skill employed in handling the litigation (failure to resolve the matter through good faith negotiations), the labor necessary (far less than actually employed), and the time consumed (excessive). As our judicial resources become increasingly constrained, it is not inappropriate for a court to consider the reasonableness of the burden imposed on those limited resources. We cannot say that the court's decision to strike this cost memorandum in its entirety was beyond the bounds of reason, particularly in the context of the trial court's approval of Lee's many other enforcement efforts. The June 2 order granting the motion to tax is affirmed.[14]

5. *Effect of Modification or Reversal on Appeal*

Before we calculate the principal amount of the judgment and accrued interest in this case, we must determine whether certain pre-*Lucky* cost and fee awards that were affected by *Lucky* were *modified* on appeal, which case interest will accrue on the award from the original date of entry of the award, or were *reversed* on appeal, in which case interest will accrue on the award from the date of entry of a new award following remand. (See *Stockton Theatres, supra,* 55 Cal.2d at pp. 442–443; *Snapp, supra,* 60 Cal.2d at pp. 817–820.) As explained *ante*, these cases hold that interest accrues from

[14] For these same reasons, we affirm the trial court's June 2, 2011 orders granting Lucky's motion to quash Lee's writ of execution, and denying Lee's discovery motions.

the date that the trial court fixes the amount due or errs in fixing the amount due but that error is corrected on appeal without the need for further factfinding in the trial court. When, on the other hand, the amount due is not and cannot be fixed until after further factfinding on remand from appellate review, interest does not begin to accrue until after the trial court fixes the amount due on remand.

On November 14, 2007, Lee filed a cost memorandum seeking $424 in enforcement costs. When Lucky failed to file a motion to tax costs, the $424 in costs were awarded by operation of law upon the expiration of the time to file such a motion, November 24.[15] Although the trial court effectively reduced this award by $335 in its February 6, 2009 order, we reversed that ruling in *Lucky*. (*Lucky, supra,* 185 Cal.App.4th at pp. 145–146.) Our ruling essentially modified the cost award so that it once again awarded the full $424. Our ruling did not allow for any additional factfinding on remand. Thus, interest on this cost award thus began to accrue upon entry of the original award in 2007.

In its February 6, 2009 order, the trial court denied Lee's December 2, 2008 request for $2,100 in fees incurred in enforcing the November 6, 2007 fee award. The court denied these fees on the ground that the November 6, 2007 award had been satisfied before Lee sought the fees. However, *Lucky* held this was error. (*Lucky, supra,* 185 Cal.App.4th at pp. 140–145.) We reversed the denial of fees and implicitly required the trial court on remand to consider the reasonableness of the fee request and to fix an amount of fees to be awarded, issues that had not been addressed in the February 6, 2009 order. (*Id.* at p. 152.) Therefore, our ruling was a true reversal and interest began to

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[15] In supplemental briefing, Lee argued that (assuming interest on awards of postjudgment fees and costs accrue at the time the awards are filed) interest began to accrue on this cost award at the time the cost memorandum was entered. Lucky argued the accrual date was November 24, "10 days after the costs were claimed, when the time to challenge them expired." The relevant statute provides that Lucky had 10 days after service of the cost memorandum to file a motion to tax. (§ 685.070, subd. (c).) Therefore, the earliest date on which that time period expired was November 24 (assuming service by personal delivery). We accept Lucky's concession that interest began to accrue on that date.

accrue on the fee award only after it was entered on remand. In the January 31, 2011 order, the trial court found that the $2,100 fee request was included in a greater $22,303.70 fee request, which in turn included a $11,835 section 425.16(c) fee request that apparently encompassed the $2,100. The court then reviewed the reasonableness of the $11,835 fee request, found it excessive, and awarded only $7,350. However, the court's July 26, 2011 order states that the full $2,100 was awarded in the January 31, 2011 order. We conclude the $2,100 fee award was entered on remand on January 31, 2011 and that interest on the award began to accrue on that date.

In the February 6, 2009 order, the trial court awarded $4,860 in fees and costs incurred in bringing the December 2, 2008 motion. In *Lucky*, we wrote that this award appeared to be a substantial reduction from what Lee had requested based on Lee's limited success in the trial court, and we ordered the court to reconsider the award in light of Lee's greater success on the motion as a result of the appeal. (*Lucky, supra,* 185 Cal.App.4th at p. 151.) Our intent was clearly to reverse the award and remand for additional factfinding and entry of a new award. The trial court again awarded fees and costs for this purpose in its January 31, 2011 order. The July 26, 2011 order concludes that Lee was awarded $4,895 in fees and $91.40 in costs for this purpose in the January 31, 2011 order, for a total of $4,986.40. We conclude that interest began to accrue on this $4,986.40 award when it was entered on remand on January 31, 2011.

D. *Calculation of Cumulative Principal and Interest in this Case*

On appeal, the parties have not specifically challenged any itemized postjudgment cost and fee award amount relied upon in the July 26, 2011 order, except as discussed *ante*, and thus we use those award amounts in our calculations here.

The judgment in this action is the June 26, 2007 order granting Lee's anti-SLAPP motion and dismissing the complaint against him. It had no monetary value.

On July 12, 2007, Lee filed a cost memorandum seeking $415 in prejudgment costs, which Lucky did not move to tax. On November 6, the court awarded Lee $26,407.50 in prejudgment costs and fees. Interest on these awards of prejudgment costs and fees began to accrue on the date of entry of the judgment, June 26. The principal

amount of the judgment on June 26, therefore, was $26,822.50 ($415 + $26,407.50). Between June 26 and November 24, $1,109.64 in interest accrued on this principal. ($26,822.50 x .10 x 151/365.) As of November 24, the principal amount of the judgment was $26,822.50 and accrued interest totaled $1,109.64.

As discussed, *ante*, Lee's November 14, 2007 cost memorandum for $424 was awarded by operation of law on November 24 and began to accrue interest on that date. The principal amount of the judgment on November 24 was $27,246.50 ($26,822.50 + $424). Between November 24 and December 31, an additional $276.20 in interest had accrued. ($27,246.50 x .10 x 37/365.) As of December 31, the principal amount of the Judgment was $27,246.50 and accrued interest totaled $1,385.84 ($1,109.64 + $276.20).

On December 31, 2007, Lucky tendered a $26,819.90 payment. Pursuant to section 695.220, this payment was first applied to accrued interest ($1,385.84) and the remainder ($25,434.06) to principal. As of December 31, 2007, therefore, the principal amount of the judgment remaining unsatisfied was $1,812.44 ($27,246.50 - $25,434.06). Between December 31, 2007 and August 20, 2008, $115.70 in interest accrued on this principal. ($1,812.44 x .10 x 233/365.) As of August 20, 2008, the principal amount of the judgment remaining unsatisfied was $1,812.44 and accrued interest remaining unsatisfied was $115.70.

On July 2, 2008, Lee filed a $587.00 cost memorandum to claim his appellate court award of costs in appeal No. A119134. Lucky filed a motion to tax, which was denied on August 18. This cost award constituted a separate judgment, which began to accrue interest on August 18. Lucky paid this separate judgment in August and there apparently is no dispute about whether it was fully satisfied.

On August 20, the court awarded Lee $33,830 in costs and fees on his July 28, 2008 motion for section 425.16(c) fees incurred in appeal No. A119134. Interest on this award began to accrue on August 20. As of August 20, the principal amount of the judgment was $35,642.44 ($1,812.44 + $33,830). Between August 20 and 21, $9.76 in interest accrued on this principal. ($35,642.44 x .10 x 1/365.) As of August 21, the

principal amount of the judgment remaining unsatisfied was $35,642.44 and accrued interest remaining unsatisfied was $125.46 ($115.70 + $9.76).

On August 21, 2008, Lucky tendered a $33,830 payment. This payment was first applied to accrued interest ($125.46); the remainder ($33,704.54) was applied to principal. As of August 21, 2008, therefore, the principal amount of the judgment remaining unsatisfied was $1,937.90 ($35,642.44 - $33,704.54). Between August 21, 2008 and February 6, 2009, $89.73 in interest accrued on this principal. ($1,937.90 x .10 x 169/365.) As of that date, the principal amount of the judgment remaining unsatisfied was $1,937.90 and accrued interest remaining unsatisfied was $89.73.

On October 28, 2008, Lee filed a $400.68 cost memorandum to claim his appellate court award of costs in appeal No. A120203. Lucky filed a motion to tax, which was denied on December 16. This $400.68 cost award constituted a separate judgment, which began to accrue interest on December 16. Lucky paid this separate judgment in December and there apparently is no dispute about whether it was fully satisfied.

On December 2, 2008, Lee filed a comprehensive fee motion seeking (a) fees for efforts to enforce the November 6, 2007 fee and cost award; (b) fees and costs incurred in appeal No. A120203 pursuant to section 425.16(c); (c) fees and costs he incurred in opposing Lucky's motion to tax his October 28, 2008 cost memorandum; and (d) fees and costs incurred in bringing the December 2 motion. The court granted this motion in part and denied it in part in its February 6, 2009 order, and in *Lucky*, *supra*, 185 Cal.App.4th 125, we affirmed the February 6, 2009 order in part and reversed it in part. We also directed the trial court to award Lee fees and costs pursuant to section 724.080 on remand. The trial court addressed these matters in its January 31, 2011 and July 26, 2011 orders. We discuss each of these cost and fee awards separately.

The trial court awarded Lee a total of $3,330 in fees in costs incurred in opposing the motion to tax the October 28, 2008 cost memorandum. The court also awarded $425 in costs that were incurred both in opposing the motion to tax and in bringing the December 2, 2008 motion. These amounts were initially awarded in the February 6, 2009 order, and were clarified in the court's July 26, 2011 order. Interest on these $3,755

in awards ($3,330 + $425) began to accrue on February 6, 2009. As of February 6, 2009, the principal amount of the judgment remaining unsatisfied was $5,692.90 ($1,937.90 + $3,755). Between February 6, 2009 and January 31, 2011, $1,129.22 in interest accrued on this principal. ($5,692.90 x .10 x 724/365.) As of January 31, 2011, the principal amount of the judgment remaining unsatisfied was $5,692.90 and accrued interest remaining unsatisfied was $1,218.95 ($1,129.22 + $89.73).

Four awards were effectively entered on January 31, 2011 and began to accrue interest on that date.

The trial court awarded Lee $2,100 in fees incurred in enforcing the November 6, 2007 fee award. The court had denied these fees in its February 6, 2009 order, but *Lucky* held this ruling was error. (*Lucky, supra,* 185 Cal.App.4th at pp. 140–145.) As explained *ante*, our ruling was a true reversal; consequently, interest began to accrue on the fee award once it was entered on remand. As the July 26, 2011 order later clarified, $2,100 in fees were again awarded in the January 31, 2011 order. Thus, interest began to accrue on the $2,100 fee award on January 31, 2011.

The trial court awarded Lee $4,895 in fees incurred in bringing the December 2, 2008 motion. The court initially awarded $4,860 for this purpose in its February 6, 2009 order. As noted *ante*, our ruling in *Lucky* setting this award aside and remanding for reconsideration was a true reversal. (*Lucky, supra,* 185 Cal.App.4th at p. 151.) On remand, the court awarded $4,895 in fees for this purpose in its January 31, 2011. Consequently, interest began to accrue on this award on January 31, 2011.

The trial court awarded Lee $5,435 in fees and costs pursuant to section 724.080 as the prevailing party on the motion for acknowledgement of satisfaction of judgment. The court awarded these fees in the January 31, 2011 order and clarified its intent with respect to the award in its July 26, 2011 order. We conclude interest on this award began to accrue on January 31, 2011.

On September 1, 2010, Lee filed two memoranda of costs in which he claimed a total of $3,022.69 in costs awarded by this court in *Lucky, supra,* 185 Cal.App.4th 125. Lucky did not file a motion to tax. The costs were awarded by operation of law upon the

expiration of the time to file a motion to tax, which was September 21.[16] This $3,022.69 cost award constituted a separate judgment, which began to accrue interest on September 21. Lucky paid this separate judgment and there apparently is no dispute about whether it was fully satisfied.

On October 12, 2010, Lee sought fees and costs he incurred in appeal No. A124965 and in bringing the October 12, 2010 motion for fees and costs, pursuant to section 425.16(c). In the January 31, 2011 order, the court awarded a total of $47,550 on these requests. Interest on this award began to accrue on January 31, 2011.

In sum, the following fee and cost awards were entered on January 31, 2011 and began to accrue interest on that date: $2,100, $4,895, $5,435, and $47,550, for a total of $59,980. The total principal amount of the judgment remaining unsatisfied as of January 31 was $65,672.90 ($5,692.90 + $59,980). Between January 31 and March 16, $791.67 in interest accrued on this principal. ($65,672.90 x .10 x 44/365.) As of March 24, the principal amount of the judgment remaining unsatisfied was $65,672.90 and accrued interest remaining unsatisfied was $2,010.62 ($1,218.95 + $791.67).

On February 1, 2011, Lucky tendered a $64,108.80 payment, which Lee rejected. Because this tender was not sufficient to satisfy the $65,672.90 judgment plus accrued interest remaining unsatisfied as of that date, it did not stop the accrual of interest.

On March 16, 2011, Lucky tendered a $70,656.47 payment. Because this tender was sufficient to satisfy the principal amount of the judgment plus accrued interest remaining unsatisfied as of that date ($65,672.90 + $2,010.62 as of March 24 = $67,683.52) and, as explained *ante*, was unconditional within the meaning of Civil Code

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[16] These cost memoranda sought costs incurred on appeal. Rule 8.278(c)(1) provides that such cost memoranda are governed by rule 3.1700. Rule 3.1700(b)(1) provides that a motion to tax costs must be filed within 15 days of the date the cost memorandum was served. An additional five days are allowed if service is by mail. (§ 1013, subd. (a).) No proof of service is in the record, but the register of actions includes the following docket entry on the date of filing: "Mature Date SEP-21-2010." This corresponds with service by mail on September 1 and a 15-day period to tax costs plus five additional days because service was by mail. Therefore, it is reasonable to infer that the time to tax costs expired on September 21.

section 1494, the tender stopped the accrual of interest on the $65,672.90 principal amount.

On March 24, 2011, the court awarded Lee an additional $3,555 in fees and costs. Interest on the award began to accrue on March 24. Between March 24 and March 28, $3.90 in interest accrued on the March 24 award. ($3,555 x .10 x 4/365.)

On March 28, 2011, Lucky tendered a $3,559.85 payment. This tender was sufficient to satisfy the principal amount of this award plus accrued interest ($3,555 + $3.90 = $3,558.90). Therefore, accrual of interest on the March 24 award ceased on March 28.[17] As of March 28, 2011, the principal amount of the judgment remaining unsatisfied was $69,227.90 ($65,672.90 + $3,555) and accrued interest remaining unsatisfied was $2,014.52 ($2,010.62 + $3.90). Because no additional interest accrued thereafter, as of July 26, 2011 the principal amount of the judgment remaining unsatisfied was $69,227.90 and accrued interest remaining unsatisfied was $2,014.52 for a total of $71,242.42. No additional interest accrued on these amounts thereafter.

III. DISPOSITION

The June 2, 2011 orders are all affirmed. The July 26, 2011 order is reversed. On remand, the court shall enter an order stating that as of July 26, 2011, the principal amount of the judgment remaining unsatisfied was $69,227.90 and accrued interest remaining unsatisfied was $2,014.52 for a total of $71,242.42, with no additional interest accruing on these amounts thereafter. The court shall conduct further

[17] Lee rejected the March 28, 2011 tender in part because it was conditional. For reasons already stated with respect to the March 16 tender, the March 28 tender was unconditional within the meaning of Civil Code section 1494.

proceedings as necessary consistent with the views expressed in this opinion. Each party shall bear its own costs on appeal.

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Bruiniers, J.

I concur:

_____
Simons, Acting P. J.

NEEDHAM, J., concurring.

I agree with the judgment of the majority in this case, as well as its conclusion that *Lucky United Properties Investment, Inc. v. Lee* (2010) 185 Cal.App.4th 125 (*Lucky*) is law of the case as to the date that interest begins to accrue on a postjudgment award of costs and fees that were incurred before the judgment. I write only to set forth the basis for the rule we summarized in an abbreviated fashion in *Lucky*, to avoid any misapprehension that it is inconsistent with our ruling today.

In *Lucky*, we explained that the principal amount of a judgment consists of the damages awarded plus costs (including attorney fees). (*Lucky, supra*, 185 Cal.App.4th at p. 137; Code Civ. Proc., § 680.300.)[1] We noted that, once the amount of costs is established after judgment entry, the court clerk enters the costs on the judgment. (*Lucky*, at p. 137; Cal. Rules of Court, rule 3.1700(b)(4).) We then cited *Bankes v. Lucas* (1992) 9 Cal.App.4th 365, 369 (*Bankes*), which teaches that postjudgment awards of costs incurred prejudgment are entered *nunc pro tunc* to the date of the original judgment entry. (The court in *Bankes* explained: "Generally, when a judgment includes an award of costs and fees, the amount of the award is left blank for future determination. [Citations.] After the parties file their motions for costs and any motions to tax costs, the trial court holds a postjudgment hearing to determine the merits of the competing contentions. When the court's subsequent order setting the final amount is filed, *the clerk enters the amounts on the judgment nunc pro tunc*." (9 Cal.App.4th at p. 369, italics added.)) On that basis, we summarized: "In other words, the amount of the cost award is incorporated into the judgment." (*Lucky, supra*, 185 Cal.App.4th at p. 137.)

We next stated the following: "Interest at the rate of 10 percent per annum accrues on the unpaid principal amount of the judgment (§ 685.010), including the amount of the cost award and attorney fees award (§ 680.300), as of the date of judgment entry (§ 685.020, subd. (a)). Therefore, interest ordinarily begins to accrue on the *prejudgment* cost and attorney fees portion of the judgment as of the same time it begins

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

to accrue on all other monetary portions of the judgment – upon entry of judgment. [Citation.]" (*Lucky, supra*, 185 Cal.App.4th at pp. 137-138, italics added.)

Our conclusion that interest commences on postjudgment awards of prejudgment costs flowed naturally from the principle in *Bankes* that "the clerk enters the amounts [awarded for prejudgment costs] on the judgment *nunc pro tunc*." (*Bankes, supra*, 9 Cal.App.4th at p. 369, italics added.) Since the amount of the costs is entered nunc pro tunc, as a matter of law the costs' entry date, and the date of their addition to the principal amount of the judgment, is deemed to be the date of the original judgment entry. And, as a matter of law, interest begins to accrue on the judgment (including the amount of the added cost award) from the date of judgment entry. (See § 685.020.)[2]

Bankes' nunc pro tunc rule has been recognized by other California appellate courts, including *Grant v. List & Lathrop* (1992) 2 Cal.App.4th 993, 996-997 [citing the predecessor rule to Cal. Rules of Court, rule 3.1700] and *Nazemi v. Tseng* (1992) 5 Cal.App.4th 1633, 1637. So established is this longstanding principle that it is recorded in Witkin's treatise on California civil procedure. (7 Witkin, Cal. Procedure 5th ed. 2008), Judgment, § 147, pp. 680-681.)

Application of the nunc pro tunc rule to establish the commencement date for the accrual of interest on awards for prejudgment costs also makes good sense and wise policy. By the time of the entry of a judgment allowing costs (including fees, by its language or operation of law), not only has the court determined who has prevailed in the action and whether a party has the right to recover costs, but all of the prejudgment costs have already been incurred. It is only due to procedural requisites – requiring a postjudgment application or motion – that the amount is not ascertained at the time of

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[2] Our citation to *Sternwest Corp. v. Ash* (1986) 183 Cal.App.3d 74, 76-77, was merely for the purpose indicated by the parenthetical – that the total judgment including an attorney fee award bears postjudgment interest. Other language in *Sternwest* — concerning interest accruing from the date of a *claim* for attorney fees — is inapposite: it pertains to accrual of interest on the fees in calculating the award, not accrual of interest on the award; it was penned before *Bankes* and other cases established the nunc pro tunc rule; and in any event, it does not hold that interest cannot accrue until the actual *order* fixing attorney fees in a certain amount.

judgment, when the right to recover costs is vested. To compensate the prevailing party for the time value of the sums it has incurred but not been reimbursed – which of course is the whole purpose in awarding interest – interest should begin to accrue on postjudgment awards of prejudgment costs as of the date of judgment entry, when the right to recover costs is first established in the prevailing party. The nunc pro tunc rule thus preserves the "legitimate fruits of the litigation which would otherwise be lost to the prevailing party," because otherwise the prevailing party would lose the time value of the amounts it had spent on costs as of the date of judgment entry. (*Mather v. Mather* (1943) 22 Cal.2d 713, 719 [stating general basis for orders entering judgment nunc pro tunc]; see *Gouskos v. Aptos Village Garage, Inc.* (2001) 94 Cal.App.4th 754, 764-765 [attorney fee order ascertaining the amount of attorney fees and costs would relate back to the judgment if the language of the judgment could be construed to grant the right to attorney fees].)

Nor is the nunc pro tunc rule trumped by the sentiment, expressed in regard to *prejudgment* interest, that a party should not begin to be liable for interest until he knows the amount of the principal. (See *Chesapeake Industries, Inc. v. Togova Enterprises, Inc.* (1983) 149 Cal.App.3d 901, 906.) *Pre*judgment interest is part of the calculation of damages, is thus concerned with fault, and is addressed by Civil Code section 3287; by contrast, *post*judgment interest is an amount that accrues on the judgment as a matter of law, due solely to the passage of time, and is addressed by the Code of Civil Procedure. The two are distinct. (See § 685.110.) Postjudgment interest is not a penalty imposed on a judgment debtor for refusing to pay a sum after learning its precise amount, but compensation for the time value of the judgment creditor's money from the date that the creditor is deemed to have the right to it.

For purposes of a postjudgment award of enforcement costs and attorney fees incurred *after* judgment, however, the nunc pro tunc rule should not apply. There is no reason to relate the cost award back to the original entry of judgment: by definition, *post*judgment costs are not incurred by the time the judgment was originally entered; nor

did the original judgment award such costs. Indeed, postjudgment enforcement costs are not contemplated by the original judgment.

In sum, under section 685.090, "[c]osts are added to and become a part of the judgment . . . upon the filing of an order allowing the costs pursuant to this chapter" and are "included in the principal amount of the judgment remaining unsatisfied;" this addition to the judgment and inclusion in the principal is *nunc pro tunc* to the date of the judgment for costs incurred before judgment, and as of the date of the cost order for costs incurred after judgment.

I concur.

NEEDHAM, J.

Superior Court of the City and County of San Francisco, No. CGC-06-454503, Paul H. Alvarado, Judge.

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